No. 13564

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

RICHARD W. DOUGLAS, *Appellee*

On Appeal from the United States District Court for the Eastern District of Washington

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The district court did not write an opinion. A letter written before trial appears at R. 8-10. Other remarks relevant to the question presented by this appeal are found at R. 169-171, 291, 297, 400-402 and in that portion of the district court's charge found at R. 502-503.

JURISDICTION

The jurisdiction of the district court was invoked under the Acts of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 251, and August 1, 1946, 60 Stat. 745, 42 U.S.C. sec. 1801 *et seq.* (R. 3-4). Its judgment was entered June 28, 1952 (R. 24-27). Notice of appeal was filed August

25, 1952 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATUTE INVOLVED

The material provisions of the Columbia Basin Project Act, approved March 10, 1943, as amended, 16 U.S.C. sec. 835 *et seq.,* are set out in the Appendix, pp. 13-16, *infra.*

At this point, they are summarized as follows:

Under (a) of Section 2, it was provided that before funds could be expended for construction of any of the irrigation features of the project, all lands within it were to be impartially appraised by the Secretary of the Interior "without reference to or increment on account of the construction of the project." At the request of the owner, the Secretary was required to make reappraisals which had to take into account expenditures made by the owner after the preceding appraisal, and other proper elements of value "other than increments on account of the construction of the project" (pp. 13-14, *infra*).

By (b) of Section 2, a landowner could not receive water for more than a nominal quarter section. And "as a condition precedent to receiving water from the project and in consideration thereof," he was required to execute a contract providing, first, that he would dispose of his excess land at the appraised value; second, that from the date of that contract to a date five years after water was delivered he would not sell the land which he could keep at more than the appraised value and would undertake in the event of its sale that an affidavit stating the consideration would be filed for

recording within 30 days and, third, that if the affidavit was not filed or the sale was made for a consideration in excess of the appraised value the Secretary could cancel the water right (pp. 14-15, *infra*).

Section 3, first, punished fraudulent misrepresentation in the affidavit by fine or imprisonment or both; second, made a transaction for a consideration in excess of the appraised value unenforceable as to that part of the consideration and, third, gave the purchaser, if within two years of the transaction he filed a correct affidavit, the right to recover the excess payment together with court costs and attorneys' fees (pp. 15-16, *infra*).

QUESTION PRESENTED

Whether just compensation for arid land condemned by the United States for the use of the Atomic Energy Commission can exceed the price for which it could have been sold at the time of the taking, this price having been previously put upon the land by the Secretary of the Interior pursuant to the direction of the Columbia Basin Project Act to appraise the land (in its arid state) impartially "without reference to or increment on account of the construction" under that Act of a project which would have brought water to the land at a later date.

STATEMENT

From June, 1912, to October, 1913, appellee, Richard W. Douglas, lived with his wife on the land here condemned (R. 126). It is a nominal quarter-section of 162.87 acres (R. 128) in Grant County, Washington (R. 26). Mr. and Mrs. Douglas went on the land in

the hope of farming it (R. 495); while they grew nothing they stayed long enough to qualify for a homestead patent; they moved because the land had no water (R. 496). In 1913 or 1914, Mrs. Douglas received the patent (R. 37). Since they left, the land has been unused (R. 126, 246). It is part of a vast area—at present inaccessible and uninhabited (R. 236-237, 464)—known as the Wahluke Slope.

Following approval on March 10, 1943, of the Columbia Basin Project Act, 57 Stat. 14 (pp. 13-16, *infra*), the East Columbia Basin Irrigation District was incorporated under the laws of Washington. On October 9, 1945, the District and the United States entered into the repayment contract (R. 67-126) required by section 2(a) of the Act (pp. 13-14, *infra*). The land of Mr. and Mrs. Douglas was in the District, and, pursuant to section 2(a) of the Act, was appraised at $1,353.01, about $8.00 an acre (see R. 42). On April 3, 1946, as a condition precedent to the delivery of water to the land, they made with the United States the contract (R. 40-42) required by section 2(b) (pp. 14-15, *infra*). This contract incorporated by reference Articles 5 through 17 of the contract made by the United States on October 16, 1945, with Norman P. and Edith R. Lawson (R. 45-64). Thus, appellee and his wife agreed (Article 10 of the Lawson contract, R. 60); that "in the period from [April 3, 1946] and to a date five (5) years from the time that * * * water is available [they] shall make no conveyance of or contract to convey a freehold estate in the subject lands * * * for a consideration exceeding their appraised value." The project is not in operation and water could not have been delivered until

1954 (R. 275). Mr. and Mrs. Douglas therefore could not have sold the land before 1959 for more than $1,353.01. Mrs. Douglas is now dead (R. 38) and appellee is her sole heir (R. 127).

On March 15, 1951, the Attorney General at the request of the Atomic Energy Commission filed a petition to condemn something over 650 acres including the Douglas tract (R. 3-6). At the same time pursuant to the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a-e) he filed a declaration of taking and for this tract deposited estimated just compensation of $1,385, slightly more than the appraised price (R. 6-8).

The case came on for trial on May 20, 1952. The Government called appellee who testified that he entered into the contract of April 3, 1946 (R. 38-39). That contract and as well the Lawson contract and the repayment contract were admitted in evidence. The Government then moved for a directed verdict in an amount not to exceed the amount provided for in the contract of April 3, 1946 (R. 128-129). The motion was denied (R. 129).

The case was tried on the trial judge's theory that the contractual limitation upon the price at which appellee could sell was to be disregarded and that just compensation was to be *whatever* amount appellee could have obtained for the land as increased in value by the future right to receive water from one who would be bound by the appraised price during the period stipulated in the contract (R. 8-10, 169-171, 291, 297, 400-402, 502-503).

Seemingly, the judge was led to this theory by his view "that it would be unfair to the landowner to make

him take the appraised value, because he isn't required to sell his retained acreage, and he would be free to sell it five years after the water is brought to the land" (R. 170) and that "Mr. Douglas * * * has a value there that should be considered * * * over and above the appraised value put upon it by the Reclamation Bureau as raw land" (R. 297).

In obedience to this theory Government witnesses valued the land—at the most—at about $25 an acre (R. 311, 403, 437), the witnesses for the landowner valued it at from $80 to $100 an acre (R. 369, 468, 490). The jury returned a verdict of $9,365.03 or about $57.50 an acre (R. 24) upon which judgment was entered (R. 24-27). This appeal followed (R. 27).

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 511-512) may be summarized as follows:

The district court erred

1. In denying the Government's motion for a directed verdict in an amount not to exceed the amount provided for in the contract between appellee and the United States, Exhibit No. 6 (R. 129);

2. In instructing the jury (R. 502-503) that:

> You are to value the land with its irrigation potentialities as they existed at the time of taking under the contracts just mentioned. In other words, you are to value this land with the contract water rights to which it was entitled under the contract, bearing in mind that the water was to be

brought to the land in the future under the terms and conditions of the contracts.

In determining market value on the basis of this theoretical buyer and this theoretical seller, you should assume that the sale was to be made of the land together with the contract water right under the contracts pertaining to the land, with all the advantages and disadvantages that go with them. You should assume, however, that the seller would be free to sell for whatever price he could obtain from the theoretical or imaginary buyer, without being limited or bound by the appraised value placed upon the land by the Reclamation Bureau. The theoretical buyer, however, would as of the date of taking, so far as the contracts are concerned, step into the shoes of Mr. Douglas and would be entitled to all the benefits and subject to all the burdens and disadvantages of the contracts. The buyer could not, of course, resell for more than the Reclamation Bureau appraised value within five years after the water for irrigation became available to the land.

3. In entering judgment on the verdict.

ARGUMENT

Just Compensation for the Land Taken May Not Exceed the Appraised Value Stipulated in the Contract

Section 2(a) of the Act required an impartial appraisal of all lands within a project "without reference to or increment on account of the construction of the project." It entitled the owner to reappraisals taking into account all proper elements of value "other than

increments on account of the construction of the project." Appellee's land was appraised at $1,353.01. He has not contended that the appraisal was too low. And the fact that he did not seek a reappraisal, indicates his satisfaction with the original appraisal. Thus $1,353.01 is the fair value of the condemned land "without * * * increment on account of the construction of the project."

Section 2(b) required appellee "as a condition precedent to receiving water from the project" to execute a contract that he would not sell his land for more than the appraised value until five years after water was delivered. Appellee made the required contract.

In addition to other penalties for a sale in violation of the contract, section 3 of the Act gave a purchaser of appraised land a cause of action for the recovery of payments made in excess of the appraised value *together with costs and reasonable attorneys' fees.* In the face of this provision, no owner of land would take the risk of trying to obtain more than the appraised value. For, however desirous he might be of receiving a greater amount, he could not have counted on the good faith of the purchaser. It would be too easy for the latter at little or no expense to himself to recover the excess while retaining the land. Thus appellee could not have sold his land for more than $1,353.01. That amount, therefore, was market value. A market value fixed by law is no less a measure of just compensation than one fixed by voluntary transactions between buyers and sellers. *Highland* v. *Russell Car Co.,* 279 U. S. 253, 262 (1929); *United States* v. *Commodities Corp.,* 339 U. S. 121, 130 (1950); *Cudahy Bros Co.* v.

United States, 155 F. 2d 905 (C.A. 7, 1946); *Louisville Flying Service* v. *United States,* 64 F. Supp. 938, 942 (W. D. Ky. 1945); *Graves* v. *United States,* 62 F. Supp. 231 (W. D. N. Y., 1945). Cf. *United States* v. *Delano Park Homes,* 146 F. 2d 473, 474 (C.A. 2, 1944). An award for a greater amount would give appellee more than the land was worth.

Nonetheless, as is shown in the Statement (pp. 5-6), the trial judge was of opinion that an award of the appraised value would be "unfair to the landowner" because he thought the land had a value "over and above the appraised value put upon it * * * as raw land." He ascribed this additional value to the fact that, since appellee's contract with the Government did not compel him to dispose of this nominal quarter section, he could hold it until expiration of the five-year period and to the further fact that the contract provided for delivery of water. Neither of these facts has any bearing upon the question of value.

The circumstance that appellee had the right under the contract to retain the land and the consequent prospect of selling it at some future date for more than its appraised value did not enhance its value at the time of the taking. As the Supreme Court has held, this so-called "retention value" is not an element of just compensation. *United States* v. *Commodities Corp.,* 339 U. S. 121, 126-129 (1950).[1]

Equally irrelevant in the determination of value is the fact that at the time of taking appellee had a con-

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[1] As the dissenting opinions show (see 339 U. S. at pp. 135-136 and 141) the holding of the Court was unanimous in this respect.

tract entitling him in the future to water from the project. Congress expressly prevented appellee from acquiring by that contract any rights which he could convert into money upon a sale of the land. Thus, the Columbia Basin Project Act required appraisal of the land as raw land, i.e., "without reference to or increment on account of the construction of the project," and prevented a sale for more than the price fixed by this method of appraisal. Therefore the contract did not confer rights which enhanced the value of the land. It follows that, contrary to the view of the trial judge, the land did not have a value "over and above" the appraised value.[2]

From whichever aspect the matter is viewed the value

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[2] The trial judge was also influenced by a thought expressed as follows (R. 297): "Suppose that Mr. Douglas' situation under these contracts was that he could never resell this land for more than a dollar an acre, but he and his heirs could keep it and use it. Is he to be deprived [by condemnation] of the valuable right of use, his life expectancy and his heirs after him, * * * simply because if he sold it he could only get a dollar an acre?"

This is not a *reductio ad absurdem* of the Government's position because it is based upon the assumption that Congress would enact a statute entirely unlike the Columbia Basin Project Act. Thus the judge assumes that Congress—why none can imagine—would require that arid land should be arbitrarily priced at less (perhaps much less) than its value and that (even after the addition of water) would *forever* forbid the owner to sell for more than this arbitrary price.

On the contrary, the Columbia Basin Project Act required that arid land be "appraised" and forbade its resale at more than the appraised value for only five years after delivery of water—and not perpetually. The five-year limitation is quite reasonable. As a Government witness testified (R. 276): "It would take that five-year period to properly develop the land and get it into production."

appraised value. Either the land is to be considered of the land at the time of the taking cannot exceed the without a contract right to receive water in the future (in which case the appraised value—the fairness of which is not in question—is as much as appellee could have sold it for) or it is to be considered as having the contract right to water (in which case the same contract limits its selling price to the appraised value). Accordingly it is plain that the trial court erred in denying the Government's motion for a directed verdict in an amount not to exceed the appraised value.

It is also plain that the trial court erred in instructing the jury to award appellee whatever amount they believed he could have obtained for the land with its contract right from a vendee who could not sell for more than the appraised value. For, when regard is had to the fact that appellee could not sell for more than the appraised value, it is obvious that a jury may not speculate as to what he could have received if he had been free of the prohibition and that in permitting them to do so the instruction was erroneous.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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March, 1953

APPENDIX

So far as material, the Columbia Basin Project Act, approved March 10, 1943, 57 Stat. 14, as amended, 16 U.S.C. sec. 835 *et seq.*, enacted to prevent "speculation in lands of the Columbia Basin Project," provides:

> Sec. 2(a) No part of the funds * * * appropriated or allotted for [Columbia Basin] project construction or for the reclamation of land within the project shall be expended in the construction of any irrigation features of the project, * * * until the requirements of the following subdivisions (i) and (ii) of this subsection (a) have been met:
>
> (i) All lands within the project shall have been impartially appraised by the Secretary of the Interior * * * and evaluated at the date of appraisal without reference to or increment on account of the construction of the project. Reappraisals may be made at any time by the Secretary, and will be made upon the request of the landowner * * *. In such reappraisals the Secretary shall take into account, in addition to the value found in the first appraisal, improvements made after said appraisal, such irrigation construction charges on the land as have been paid, and other items of value that are proper, other than increments on account of construction of the project. * * *
>
> (ii) Contracts shall have been made with irrigation, reclamation, or conservancy districts organized under State law embracing the lands within the project providing for payment thereby of that part of the cost of construction of the project de-

termined by the Secretary to be the part thereof to be repaid by irrigation. * * *

(b) (i) The lands within the project shall be developed in irrigation blocks, * * *. The Secretary shall segregate the lands in each irrigation block into farm units * * *. No farm unit shall contain more than one hundred and sixty or less than ten acres of irrigable land, except that any nominal quarter section comprising more than one hundred and sixty acres of irrigable land may be included in one farm unit, * * *.

* * * * * *

(iii) Water shall not be delivered * * * to * * * lands not conforming * * * to the farm units covering the lands involved * * *.

(iv) Lands within the project in excess of one farm unit held by any one landowner shall * * * be deemed excess land: * * *.

* * * * * *

(v) * * * (c) As a condition precedent to receiving water from the project and in consideration thereof, each landowner shall be required to execute, within six months from the date of the execution of the contract between the United States and the district within which the land is located, a recordable contract covering all his lands within that district, * * *.

Each such recordable contract shall provide—

(i) That the landowner will conform his lands * * * to the area and boundaries of the pertinent

farm unit or units shown on the plats filed under subsection 2(b) and will dispose of excess land * * * at its appraised value; that the Secretary is thereby given an irrevocable power of attorney to sell in behalf of the landowner any such excess land at said appraised value; and that the United States is thereby given * * * an option to buy any such excess land at said appraised value; * * *.

(ii) That in the period from the date of execution thereof and to a date five years from the time water becomes available for the lands covered thereby, no conveyance of or contract to convey a freehold estate in such lands, whether excess or nonexcess lands, shall be made for a consideration exceeding its appraised value, and * * * the grantor or vendor or the grantee or vendee or any lien holder thereof shall, within thirty days from the date of such conveyance or contract, file in the office of the county auditor in the county or counties in which the land is located an affidavit describing * * * the consideration therefor.

(iii) That in the event that within such period such a conveyance of, or contract to convey, is made without filing within said thirty days the affidavit required * * * or is made for a consideration in excess of the appraised value, the Secretary, * * * may cancel the right of such estate to receive water * * *.

* * * * * *

Sec. 3(a) Fraudulent misrepresentation as to the true consideration involved in the conveyance

of, or contract to convey, any freehold estate in land covered by a recordable contract * * * in the affidavit * * * shall constitute a misdemeanor punishable by a fine not exceeding $500 or by imprisonment not exceeding six months, or by both * * *.

(b) Should any freehold estate in lands subject to the recordable contract * * * be conveyed or contracted to be conveyed, after the date of execution of such recordable contract and within five years from the time water becomes available for such lands, at a consideration in excess of the appraised value of said estate, the transaction * * * shall be invalid and unenforceable by the vendor or grantor, * * * as to that part of the consideration in excess of the appraised value * * *. * * *

The vendee or grantee * * * at any time within two years from the date of any such conveyance or contract and on filing a correct affidavit * * * may recover * * * an amount equal to the payments made in excess of the appraised value.

In connection with any judgment or decree hereunder in favor of a vendee or grantee, said vendee or grantee shall have the right to recover court costs and reasonable attorneys' fees.

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